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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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The Honorable Clair W. Burgener
House of Representatives

Dear Mr. Burgener:

By letters of June 27 and July 12, 1977, you requested our opinion as to whether certain parts of the regulations issued by the Economic Development Administration (EDA) to implement round II of funding under the Local Public Works Capital Development and Investment Act of 1976, title I of Pub. L. No. 94-369, 90 Stat. 999, as amended by the Public Works Employment Act of 1977, title I of Pub. L. No. 95-28, 91 Stat. 116, are in accordance with these authorizing statutes and their legislative histories.

More specifically, you expressed concern regarding the regulations pertaining to school district participation because "These regulations make rural school districts ineligible to apply for any funds under Round II unless the school districts serve 'the entire county'." Since school district boundaries in the State of California are not coterminous with county boundaries, you assert that "188 California school districts having 206 pending applications totalling \$231,540,064 are ineligible under current regulations." You suggest that such a result is contrary to legislative intent since "Congress made it quite clear that school districts were to participate in the funding by including specific language" in both the statute and a joint explanatory statement of the Conference Committee requiring that project applications for school districts be accorded equal priority with those of general purpose local governments under the Act.

For the reasons stated hereafter, we conclude that the relevant regulations are consistent with the authorizing legislation, and we do not believe that they preclude eligibility of rural school districts in California that do not serve the entire county.

A brief summary of the program may be helpful before discussing the pertinent regulations in order to place them in perspective. The purpose of round II funding (LPW grants) under the Local Public Works Capital Development and Investment Act of 1976, as amended, as expressed by the Secretary of Commerce, in letters discussed during the course of the Senate debate, is to target aid to economically depressed areas of greatest need to improve the Nation's acute

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unemployment problem and stimulate the economy. See 123 Cong. Rec. S3894 (daily ed., March 10, 1977). Thus, with a few exceptions, LPW grants are made through a planning target system. In order to insure an equitable geographic distribution of funds, EDA established planning targets for States, sub-State areas and sub-State applicants. 13 C.F.R. § 317.50, 42 Fed. Reg. 27437 (May 27, 1977). State planning targets are established in accordance with allocation criteria set forth in the statute. Sub-State area planning targets are computed for "project areas" which have unemployment rates equalling or exceeding the lower of 6.5 percent or the State average unemployment rate. Id.

EDA reports that, in addition to the statutory language, the LPW grant distribution system, including school district participation in sub-State applicant planning targets, was significantly shaped by the following statements contained in the Conference Report, H.R. Rep. No. 95-230, 21, 22 (1977):

"* * * The conferees expect the next phase of the public works job program to be implemented in accordance with the following assumptions and policy directions. A project area will be a city; a county; the balance of a county in which such city is located; or a pocket of poverty under section 108(e) where the project is within an urbanized area. Unemployment statistics (as to total number of unemployed and rate) are to be determined for project areas, not for applications. It is intended that all communities, regardless of size, that otherwise qualify, are to be treated as applicants.

* * * * *

"Only project areas in excess of 6.5 percent unemployment may receive grants, except (1) where the State unemployment rate is less than 6.5 percent, in which case only project areas in excess of the State average unemployment rate may receive grants, and (2) in minimum allocation States where the Secretary waives the priorities of section 108(c). A share of the State's allocation of funds shall be established for each such project area, based on numbers and rate of unemployment in such area, to serve as a benchmark or planning target.

"The Secretary of Commerce shall assure equity and a substantial portion of project awards, for each category of general purpose local government applicants and projects endorsed by such applicants, within each project area. * * * A school district shall be treated on the same basis as a general purpose local government, for all purposes. * *"

EDA has further advised us that:

"As a result of these directions, EDA was required to develop a program which allocated funds to certain types of areas having available statistics on both numbers of unemployed and rate of unemployment and which permitted the full participation of projects sponsored by school districts. In this context, the nature of school districts presented two problems. They were not among the entities identified by the conference report as project areas eligible for planning targets; and, unemployment statistics, the criteria for determining the amount of planning targets, are not available for school districts. In view of these problems, EDA decided that various requirements of the LPW legislation and legislative history would be served best by treating school districts as partners of the various eligible areas in which they are located. While receiving no distinct or separate planning targets, school districts would have an equal right with corresponding local governments to which planning targets are assigned in selecting those projects to be funded from the planning targets."

It was with this background that EDA promulgated the regulations pertaining to school district participation in 13 C.F.R. § 317.53(d), 42 Fed. Reg. 27438 (May 27, 1977), which, with some modifications, were transferred to 13 C.F.R. § 317.55, 42 Fed. Reg. 35824 (July 11, 1977). The amended regulations provide:

"§ 317.55 School district participation in planning targets.

(a) Subject to the provisions of this section, school districts may share in the planning targets of:

(1) Primary cities or non-primary cities/
townships; and

(2) County governments.

(b) In order to participate in these planning targets, the school district must have authority under local law to file an application.

(c) For a school district to share in the planning target of a primary city or non-primary city/township, the school district project must principally serve the residents of the primary city or non-primary city/township, e.g., at least 50 percent of the students served by a school project must be residents of that primary city or non-primary city/township.

(1) A school district project may be eligible to share in the planning target of more than one non-primary city/township if it principally serves those applicants.

(d) For a school district to share in the planning target of a county government, the school district must:

(1) Serve the entire county; or

(2) In the event the school district is located in a county with primarily unincorporated land area, the school district must, in order to share in the planning target of that county, meet the following requirements:

(i) The school district demonstrates that more than 50 percent of the area of the county is unincorporated;

(ii) The school district serves at least 40 percent of the population of the unincorporated area; and

(iii) The school district's project principally serves the residents of the unincorporated area, e.g., at least 50 percent of the students served by a school project must be residents of the unincorporated area.

(e) School districts will share in the planning targets listed in paragraph (c) of this section by jointly prioritizing their projects with the projects of those applicants whose planning targets they are sharing and by submitting a unified list of priority projects as required by § 317.37.

(f) Should the school district and the applicant whose planning target it shares fail to come to agreement with respect to prioritizing their projects, EDA will select projects according to factors which include, but are not limited to:

- (i) Job creating potential;
- (ii) Time necessary to complete the project;
- (iii) Energy conservation;
- (iv) Long term economic benefits; and
- (v) Critical local needs."

In its report to us, EDA interprets these regulations as follows:

"Section 317.55(b) requires that a school district have authority under local law to file an application as the only pre-condition to participation in the program. Subsections (c) and (d) explain the necessary geographic relationships for school districts to share in project area planning targets. In order to participate in the planning target of a primary city or non-primary city/township, the school district must demonstrate that its proposed project will 'principally serve' the residents of the primary city or non-primary city/township. 'Principally serve' means that at least fifty percent of the students served by the project will be residents of the area receiving the planning target. A school district can qualify to share in a county government planning target in two ways. First, if the school district serves the entire county, it can share in the county government planning target. The second method applies in counties in which a majority of the land area is unincorporated. Here, if a school district can demonstrate that it serves at least forty percent of the population of the unincorporated area and that its proposed project will

'principally serve' the residents of the unincorporated area, it can share in the county government planning target.

"Subsection (e) of § 317.55 details the project selection process used by a qualified school district and the project area whose planning target it shares. Subsection (f) describes the alternate method of selection should those parties fail to agree.

"As this description of the regulations indicates, school districts which do not serve an entire county are able to participate in the LPW program. EDA's regulations and policies have not required that school district and county boundaries be coterminous to allow school district participation in the LPW program. School districts located outside a primary city and serving less than an entire county are eligible for round II LPW assistance. Depending on district boundaries and the service area of the proposed project, such school districts can share in one of two different planning targets. If a proposed school district project 'principally serves' an eligible non-primary city/township, the school district can share in that applicant's planning target. If the school district is located in an eligible county with a majority of its area unincorporated, it can qualify to share in the county government's planning target on the basis of the previously described criteria."
(Emphasis added.)

We concur with EDA's interpretation of its regulations, and we agree that these regulations pertaining to school district participation in LPW grants do not preclude eligibility of rural school districts in California that do not serve the entire county, assuming that the criteria discussed above can be met.

In addition, we believe that these regulations are consistent with the authorizing legislation. Subsection 108(b)(4) of the Local Public Works Capital Development and Investment Act of 1976, as added by section 106 of the Public Works Employment Act of 1977, 91 Stat. 118, states:

"A project requested by a school district shall be accorded the full priority and preference to public works projects of local governments provided in section 108(b) of this Act."

Subsection 108(b) of the Act, 90 Stat. 999, 1001, provides:

"In making grants under this Act, the Secretary shall give priority and preference to public works projects of local governments."

Although on first impression EDA's school district participation regulations may not appear consistent with subsection 108(b)(4) since school districts are not given independent planning targets as are other local governments, further analysis reveals that these regulations satisfactorily comport with the terms and the legislative histories of the statutes.

The language of subsection 108(b)(4) originated in the version of the bill reported by the Senate Committee on Environment and Public Works. No comparable provision was contained in the House bill. See H.R. Rep. No. 95-230, *supra*, at 17. Apparently it was added to clarify a suggested change by EDA in its scoring formula for project selection for round II from that used in round I, namely 5 percent bonus points for proposed projects of general purpose local governments (which was defined to include school districts) and 3 percent bonus points for special purpose districts. See 13 C.F.R. §§ 316.2 and 316.10, 41 Fed. Reg. 46420 and 46422 (October 20, 1976); 123 Cong. Rec. S3855 (daily ed., March 10, 1977); and S. Rep. No. 95-33, 8, 9 (1977). The Senate report states at page 9:

"Projects requested by school districts will have equal priority with those of general purpose local governments in the evaluation of applications under the reported bill. The administration proposed in its revised scoring system that units of general purpose local governments be given 10 points, special purpose governments 5 points, and states 0 points. The committee votes to give applications from school districts the full priority accorded to general purpose local governments."

The original purpose, therefore, of subsection 108(b)(4) was merely to insure that projects of school districts receive the same number of bonus points in the scoring formula for selection of projects as general purpose local governments.

On the other hand, the House bill proposed a completely different method for establishing priorities among certain project applications,

namely requiring the applicants themselves to determine them. Subsection 2(e) of H.R. 11, 95th Cong., 1st Sess. 4 (1977), as reported by the House Committee on Public Works and Transportation on February 16, 1977, provided:

"Whenever a State or local government submits applications for grants under this Act for two or more projects, such State or local government shall submit as part of such applications its priority for each such project."

See also, H.R. Rep. No. 95-20, 6 (1977). This provision was enacted by subsection 107(c) of Pub. L. No. 95-28 as subsection 108(d) of Pub. L. No. 94-369 for application in round II. Thus both this provision and subsection 108(b)(4), *supra*, were enacted in the same law, although their interrelationship was not explained. Nevertheless, despite the fact that subsection 108(d) was not mentioned in the "Joint Explanatory Statement of the Committee on Conference," *supra*, we note that the Senate Floor Manager during the debate on the Conference Report stated:

"Senators will be pleased to know that EDA is proposing to demote the computer. It will not select projects by some arbitrary and capricious scoring system. Competition between applicants has been removed. Local officials will have the opportunity to indicate their priorities--and EDA will be required to respect those priorities. Round I errors will be corrected. From what I know now about this proposed system, it appears to be a solid improvement over last year's and the one proposed in February of this year. I hope we can improve on it."

123 Cong. Rec. S6711 (daily ed., April 28, 1977) (remarks of Senator Quentin Burdick).

In view of the legislative history of both subsections 108(b)(4) and 108(d) and the two problems associated with school districts discussed earlier (*i.e.*, ineligibility as project areas and unavailability of unemployment statistics), we believe that inclusion of school districts within the planning targets of the eligible areas in which they are located and the joint prioritization of project applications, including those of school districts, within each unit are consistent with the authorizing statutes. These procedures

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do implement the legislative mandate to give qualified school districts an equal voice with eligible local governments in determining the projects selected for funding from LPW planning targets in a manner compatible with the other statutory provisions and indicia of congressional intent discussed above.

In addition, we believe the factors set forth in 13 C.F.R. § 317.55(f) for selecting projects, should the school district and the applicant whose planning target it shares fails to come to agreement with respect to prioritizing their projects, comports with the legislative intent as expressed in the following paragraph of the Conference Report, supra, at 22:

"In case of projects of different applicants within a county or balance-of-county project area which are otherwise equal in priority, consideration shall be given to the relative unemployment statistics of the applicants, if recent comparable data is available, and, if necessary, to various criteria for differentiating the projects themselves, such as the job-creating potential and time necessary for completion of the project, the energy conservation potential of a building project under section 108(b)(2), the project's value in alleviating drought or other critical local needs, or the long-term economic benefits of the completed project."

We note that members of the leadership of the appropriate subcommittees in both Houses, during the course of the debate on the passage of the Public Works Employment Act of 1977, supra, had expressed an intent to hold hearings on EDA's proposed regulations to implement that Act prior to their issuance. See 123 Cong. Rec. S6711 (daily ed., April 28, 1977) and 123 Cong. Rec. H3927, H3930, and H3934 (daily ed., May 3, 1977). Such oversight hearings were held in both Houses. The regulations pertaining to school district participation were specifically discussed during the course of these hearings, and no objections to them were raised. See "Oversight of Proposed Rules and Regulations of the Public Works Employment Act of 1977," Hearings Before the Subcommittee on Regional and Community Development, Senate Committee on Environment and Public Works, 95th Cong.,

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1st Sess. 8-12, 15, and 16 (May 17, 1977). Printed House hearings are not yet available.

Sincerely yours,

(SIGNED) ELMER B. STALEY

Comptroller General
of the United States